

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LOUIS MOSS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2006

No. 260726

Kent Circuit Court

LC No. 04-005883-FH

Before: Zahra, P.J., and Neff and Owens, JJ.

PER CURIAM.

A jury convicted defendant of one count of carjacking, MCL 750.529a, one count of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and one count of unarmed robbery, MCL 750.530. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent sentences of 22-1/2 to 75 years' imprisonment for carjacking, 10 to 15 years' imprisonment for assault with intent to commit criminal sexual conduct involving sexual penetration, and 10 to 22-1/2 years' imprisonment for unarmed robbery. He appeals as of right. We affirm.

I Basic Facts and Proceedings

In the early morning hours of February 25, 2004, the victim agreed to give defendant a ride to his girlfriend's home in Grand Rapids. Defendant provided the victim incorrect directions, and she eventually pulled into a parking lot and told defendant that she would not drive him farther. Defendant then violently attacked the victim and demanded that she remove her pants. He indicated that he planned to have sexual intercourse with her. When the victim refused, defendant tried to remove her pants, breaking the zipper. The victim then lost consciousness.

When the victim regained consciousness, she was in the passenger seat of her car. Defendant was driving. When defendant realized that the victim was conscious, he stopped and forced her out of the car. He then immediately drove away, leaving the victim lying on a country road in Ottawa County.

The jury convicted defendant of the three crimes with which he was charged.

II Instructional Error

On appeal, defendant first argues that, before voir dire, the trial court improperly instructed the jury pool regarding the charges of carjacking and assault with intent to commit criminal sexual conduct involving sexual penetration.

A Standard of Review

Because defendant failed to object to the statements now challenged, defendant's issue is not properly preserved for appeal. This Court reviews unpreserved claims of instructional error for plain error affecting defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Error affects substantial rights if it is outcome-determinative, and "[a] reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B Analysis

Defendant initially objects to the trial court's description of the carjacking charge, arguing that the trial court's statement "foreshadowed the testimony at trial" and indicated to the jury the trial court's belief that defendant was guilty. We disagree.

Instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected defendant's rights." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Here, the trial court did not tell the jury that defendant should be found guilty of carjacking. Instead, the trial court emphasized in the initial instructions that *if* "there's somebody in the car . . . and you either take the car without permission with them in it, or, frankly, get rid of them, kick them out, or whatever else . . ." *then* a carjacking has occurred. The trial court additionally cited another example of the type of conduct that could constitute carjacking. These cited examples, as a matter of law, are sufficient to establish a claim of carjacking, MCL 750.529a(1), and defendant does not argue otherwise. Furthermore, a trial court's use of examples to clarify legal terms and concepts is not error if a trial court clearly indicates to the jury that the examples are examples and the jury is responsible for determining guilt or innocence by following the jury instructions as a whole. *People v Edwards*, 206 Mich App 694, 696-697; 522 NW2d 727 (1994), citing *People v Shepherd*, 63 Mich App 316; 234 NW2d 502 (1975). In this case, the trial court instructed the jury that it was not suggesting by way of its instructions that a carjacking occurred, but was merely describing to them what a carjacking offense entailed. Accordingly, we conclude that the trial court did not plainly err when it gave these instructions to the jury.

Defendant next argues that the trial court erroneously instructed the jury pool that the charge of assault with intent to commit criminal sexual conduct involving sexual penetration was "basically an attempted rape." Although defendant notes that the trial court properly instructed the jury regarding the elements of the charge of assault with intent to commit criminal sexual

conduct involving sexual penetration, he argues that the jury was already tainted by the trial court's comment to think of the charge as a charge of attempted rape.

Defendant provides no authority to establish that "attempted rape" would not be included in the acts establishing the crime of assault with intent to commit criminal sexual conduct involving sexual penetration. Nevertheless, we note that, by describing defendant's alleged act of sexual misconduct as "basically an attempted rape," the trial court provided a more limited description of acts constituting "assault with intent to commit criminal sexual conduct involving penetration" than those actually included in the definition of "sexual penetration" in MCL 750.520a(o). MCL 750.520a(o) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." By describing defendant's alleged crime as "basically an attempted rape," the trial court essentially instructed the jury that they could find defendant guilty of assault with intent to commit criminal sexual conduct involving sexual penetration only if they found that defendant tried to force the victim to engage in genital contact, although defendant also could have been convicted of this charge if the jury found that he tried to force the victim to engage in cunnilingus, fellatio, or a variety of other sexual acts involving penetration. For this reason, we agree with defendant that the challenged instruction was erroneous.

Although the trial court erroneously described the charge of assault with intent to commit criminal sexual contact involving sexual penetration as an "attempted rape," we find that the error did not prejudice defendant. The trial court provided a more limited description of the acts that constitute a violation of MCL 750.520g(1) than the acts included in the statutory definition of "sexual penetration." And, the jury was instructed with a complete and proper instruction before deliberation. It was also instructed that, if the trial court made any contradictory statements before voir dire, the latest instruction should be followed. Here, the latest given instruction was complete and proper. Thus, defendant cannot establish that his substantial rights were affected. He was not denied a fair trial. Accordingly, the trial court's erroneous initial description of the charge of assault with intent to commit criminal sexual conduct involving sexual penetration as an "attempted rape" does not constitute plain error warranting reversal.

Finally, defendant argues that the trial court improperly suggested to the jury pool that the allegations of assault with intent to commit criminal sexual conduct and of carjacking had already been proven. Specifically, defendant challenges the following statement: "I believe the allegation is that the attempted rape and the beginning of the violent taking of the automobile occurred in a parking lot by a Marathon gas station just this side of the county line." This statement was made in the context of explaining that the alleged crimes, if they occurred, began in Kent County. The trial court emphasized elsewhere in its introductory remarks that the charges at issue in the present case were mere allegations and that the jury would decide what had happened on the night in question. Accordingly, we conclude that the trial court did not plainly err when it made the challenged statement.

III Prosecutorial Misconduct

Defendant next argues on appeal that the prosecutor committed misconduct because she "suggested to the jury that [defendant] raped the victim."

A Standard of Review

Defendant did not object to the statement, and thus, he failed to preserve this issue. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). We review unpreserved issues of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Id.* at 32.

B Analysis

Defendant specifically claims that the prosecutor committed misconduct in making the following statement during closing argument:

I don't know if he actually rapes her after that or not because we never got the panties. He's fortunate we didn't get the panties because who knows what we would have found if we had the panties. We only have the pants.

I can't prove whether he made penetration or whether he ejaculated. No, I can't. But I didn't charge him with that. I charged him with assaulting her with intent to do that.

Defendant argues that there was no evidence of a completed rape in this case but the prosecutor suggested to the jury that defendant had actually raped the victim.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. [*People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003).]

By claiming that she had no knowledge that defendant raped the victim, the prosecutor concomitantly suggested to the jury that it may have occurred. We conclude that the prosecutor committed misconduct when she suggested to the jury that defendant may have raped the unconscious victim. Since there was no evidence admitted at trial that defendant actually raped the victim, the prosecutor's remarks were unsupported and therefore improper. "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case." *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992).

However, we conclude that this remark by the prosecutor, while potentially inflammatory, does not require reversal because a timely curative instruction could have cured any alleged prejudice. Defendant's substantial rights were not affected and reversal of the unpreserved claim of prosecutorial misconduct is not warranted. *People v Watson*, 245 Mich App 527, 586; 629 NW2d 411 (2001).

IV Improper Hearsay

Defendant also argues that the trial court impermissibly admitted improper hearsay testimony from Officer Roger Dreyer, a detective with the Ottawa County Sheriff's Department.

A Standard of Review

Again, defendant failed to object at trial to this allegedly improper hearsay testimony, and thus, he did not preserve this issue for appeal. MRE 103(a)(1). We review unpreserved evidentiary issues for plain error affecting defendant's substantial rights. MRE 103(d); *Carines*, *supra* at 763.

B Analysis

The trial court permitted Dreyer to testify on two occasions that defendant and his attorney informed the authorities that the incident at issue began in Kent County.

We agree that the information presented by Dreyer on direct examination regarding the location of the incident is hearsay. MRE 801(C) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The challenged line of questioning indicated that Dreyer knew that the initial assault on the victim took place in Kent County through out-of-court statements made by defendant's attorney and by the victim. Specifically, Dreyer indicated that he determined that the initial assault occurred in Kent County after learning that defendant's attorney had told the Ottawa County prosecutor that defendant claimed the initial incident occurred in Kent County and after asking the victim to pinpoint the location where the initial assault occurred.

Although Dreyer had two sources on which to base his statement that the assault occurred in Kent County, both sources were out-of-court statements. The prosecution clearly offered the evidence to establish the truth of the matter asserted in the statement, specifically, that the incident began in Kent County. Because the statement falls under the definition of hearsay found in MRE 801(C), it was inadmissible pursuant to MRE 802.

Regardless, the hearsay testimony does not constitute plain error affecting defendant's substantial rights. *Carines*, *supra*. Contrary to defendant's argument, we disagree that Dreyer's statement, that the initial assault took place in Kent County, implied that defendant confessed to carjacking and sexual assault. Dreyer's reference to “the assault” did not imply that defendant confessed to carjacking and sexual assault. Defendant admitted at trial that he committed unarmed robbery and beat the victim in the parking lot near the intersection of Leonard Street and Remembrance Road. At trial, defendant testified that he told his attorney that he committed the unarmed robbery and the assault, and the crimes occurred in Kent County. Thus, the reasonable inference from Dreyer's testimony was that defendant confessed to unarmed robbery and assault, nothing else.

Defendant additionally argues that his counsel was ineffective for failing to object to the admission of this allegedly improper hearsay testimony. “To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense.” *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). As previously noted, the admission of Dreyer's testimony did not lead to an inference that defendant confessed to carjacking and sexual assault. Defendant's own testimony supported that he admitted to some crimes and that they occurred in Kent County. Consequently, defendant cannot establish prejudice resulting from the alleged error of trial counsel.

Defendant also argues that Dreyer's statements on redirect examination regarding the location of the initial assault constitute impermissible hearsay. However, because this information was admissible for a non-hearsay purpose, we find that the trial court did not plainly err when it permitted Dreyer to testify on redirect examination regarding the location of the initial assault.

On cross-examination, defense counsel questioned Dreyer regarding his investigation of the assault, including his initial presumption that the incident occurred in Ottawa County. Defense counsel elicited testimony including Dreyer's statements that he did not ask defendant where the incident occurred and that he only learned that the incident actually occurred in Kent County after talking with the victim, who later admitted to being "dazed and confused" on the night of the incident. This testimony questions the reliability of Dreyer's investigation. The prosecutor's questions to Dreyer on redirect examination regarding the information he received from defense counsel, through the prosecutor's office, that the initial assault occurred in Kent County were admitted to show that Dreyer did not only rely on the victim to conclude that the initial assault occurred in Kent County and that this conclusion was sound. Accordingly, the trial court did not plainly err when it permitted Dreyer's testimony that he had been indirectly informed by defense counsel that the initial assault occurred in Kent County, in light of defense counsel's questions on cross-examination regarding the reliability of Dreyer's investigation.

"Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Riley, supra* at 142. Because Dreyer's redirect examination testimony was admissible for a non-hearsay purpose, defense counsel was not ineffective for failing to object to its admission.

IV Cumulative Errors

Defendant also argues that the cumulative effect of the errors at trial denied him of a fair trial and reversal of his convictions is required. Because no prejudicial error has been identified in this case, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

V Sentencing

Finally, defendant challenges the scoring by the trial court of offense variable (OV) 4, MCL 777.34, and OV 7, MCL 777.37. This Court reviews the number of points scored against a defendant for a particular offense variable for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." See *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Defendant first challenges the scoring of 10 points against him under OV 4. "Offense variable 4 is psychological injury to a victim." MCL 777.34(1). A defendant is scored 10 points under OV 4 when "[s]erious psychological injury requiring professional treatment occurred to a

victim.” MCL 777.34(1)(a). MCL 777.34(2) instructs the sentencing court to “[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.” *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Although the victim did not complete a formal written victim impact statement, the presentence investigation report indicated that the victim told an investigator from the Michigan Department of Corrections that she planned to “eventually go for counseling due to the trauma caused by the defendant.” The victim explained that she probably would have already sought counseling, except that she was unable to take time off work to attend an appointment. The victim therefore claimed to have suffered psychological injury as a result of the carjacking and sexual assault, and she planned to receive counseling when she had the opportunity. Moreover, the trial court had the opportunity to view her demeanor and hear her description of events. See *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005), where this Court based its decision to score 10 points to the defendant under OV 4, in part, on its observations of the victims’ demeanor. The trial court’s decision to score 10 points to defendant for OV 4 was properly supported by the record.

Defendant also challenges the scoring of 50 points for OV 7. “Offense variable 7 is aggravated physical abuse.” MCL 777.37(1). A defendant is scored 50 points under OV 7 if “[a] victim was treated with terrorism, sadism, torture, or excessive brutality.” MCL 777.37(1)(a). The record in this case supports the trial court’s finding that the defendant treated the victim with excessive brutality. Between 3:00 a.m. and 3:30 a.m., on a cold February night, soon after the victim regained consciousness following a severe beating, defendant pushed her out of her own car onto a secluded country road and drove away. Defendant did not need to brutally beat the victim and subsequently push her out of the car and leave her lying in the middle of the road on a freezing night in order to commit the crimes of carjacking, assault with intent to commit criminal sexual conduct involving sexual penetration, or unarmed robbery. Therefore, we find that the trial court’s decision to score 50 points to defendant under OV 7 is supported by evidence on the record. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Donald S. Owens